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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

Term No. 342.

AQUILA H. PICKERING,
Plaintiff in Error,
vs.
JOHN A. LOMAX AND WILLIAM KOLZE,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

L. H. BISBEE,
WILLIAM E. FURNESS.
ATTORNEYS FOR PLAINTIFF IN ERROR.

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BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This is an action of ejectment, brought by plaintiff in error against defendants in error to recover two certain tracts of land in Cook county, Illinois, which are particularly described in the declaration. (Rec., 1.) The parties waived a jury and submitted to a trial before the court, which resulted in a judgment in favor of the defendants in error (Rec., 4), upon which the plaintiff sued a writ of error to the Supreme court of Illinois, which, after a hearing, affirmed the judgment of the lower court; and the plaintiff in error now brings the case to this court by writ of error (Rec., 97–100), as a case involving the construction of a part of the treaty between the

United States of America and the united nations of the Chippewa, Ottawa and Pottawatomie Indians, etc., made and concluded at Prairie du Chien, July 29, A. D. 1829. (Rec., 97.)

On the trial, in order to establish his title, the plaintiff in error offered in evidence (Rec., 35) Article 4 of the above-mentioned treaty.

United States Stat. at Large, Vol. 7, p. 321,

as follows: "There shall be granted by the United "States to each of the following persons (being descend- "ants from Indians) the following tracts of land, viz:

"To Claude Laframboise, one section of land on the "Riviere Aux Plains, adjoining the line of the purchase of "1816;

* * * * *

"To Alexander Robinson, for himself and children, "two sections on the Riviere Aux Plains above and adjoin- "ing the tract herein granted to Claude Laframboise;

* * * * *

"The tracts of land herein stipulated to be granted "shall never be leased or conveyed by the grantees or "their heirs to any persons whatever, without the per- "mission of the President of the United States."

The plaintiff in error also offered in evidence (Rec., 36) a copy of the patent issued by the government December 28, 1843, under the provisions of the above treaty, granting the lands, including those in litigation, to Alexander Robinson, for himself and children, which contains this provision, viz: "But never to be leased or "conveyed by him, them, his or their heirs, to any per- "son whatever, without the permission of the President "of the United States."

He also introduced evidence (Rec., 9) of a decree in a suit in partition, instituted February 22, 1847, in the Cook County court of Common Pleas between Alexander Robinson and his children of the lands granted by the patent, and evidence to show that the lands in question were set off to Joseph Robinson, one of the children. (Rec., 12–16 and 26–30.)

Also evidence tending to prove the following conveyances:

First. A deed dated August 3, 1858, from said Joseph Robinson and wife to John T. Horton (Rec., 16–26 and 50, 51), which has endorsed upon it the approval of the President of the United States, of date January 21, 1871. (Rec., 19, 26.)

Second. Administrator's deed of Leon Straus, administrator, etc., of the estate of John F. Horton, deceased, to Moses W. Baer, dated October 6, 1863, (Rec., 38–50 and 65) made in pursuance of an order of sale by the County court of Cook county, for payment of debts.

Third. Several intermediate conveyances of the premises, down to a deed dated November 10, 1866, from Henry H. Dyer and wife to Aquila H. Pickering, the plaintiff below and in error. (Rec., 65 and 66, and 6.)

The defendant in error introduced no evidence, but at the close of the plaintiff's case moved the court that the plaintiff's evidence be excluded and the case dismissed, on the ground that the very foundation of the plaintiff's title fails in that the deed from Joseph Robinson to John F. Horton (Rec., 16–26), made in 1858, was made in direct violation of the terms of the patent as to obtaining the approval of the President to the conveyance. (Rec., 86.)

The court sustained the motion and plaintiff excepted, whereupon the court decided, *that* Robinson had no authority to convey without obtaining the permission of the President beforehand; that the subsequent sanction obtained by persons claiming title under Robinson was invalid and that even if the subsequent sanction would have the effect of giving force to the deed, yet, as the grantor under that deed was dead, the administrator's deed would not carry any title to the purchaser for him, but if any title accrued, it would *be to the heirs* of Horton. (Rec., p. 86.)

The plaintiff excepted and requested the court to hold the following proposition of law (Rec., 87):

First. That under the treaty mentioned in the patent in evidence in this case, and under the provisions of said treaty and patent, it was not necessary for Joseph Robinson to apply to the President of the United States in the first instance for leave to convey, but that the President had power to approve any deed said Joseph Robinson might make, subsequent to the execution and delivery of such deed, and that the approval of the President of any such deed, subject to the execution and delivery thereof, would make the same a valid deed of conveyance.

Second. That the approval by the President of the United States of the deed of Joseph Robinson and wife to John F. Horton, in evidence in this case, made by the President on the 21st day of January, A. D. 1871, gave force and effect to said deed and made the same a valid conveyance.

Third. That the approval by the President of the United States of the deed of Joseph Robinson to John F. Horton, made on the 21st day of January, 1871, by

an endorsement on a certified copy of said deed, was a valid act on the part of the President, and by virtue thereof the said deed became a valid conveyance, and took effect by relation back to the date of the original deed, in the absence of any other deed or approval to any other party from said Joseph Robinson, notwithstanding the death of said John F. Horton before the approval of said deed from Robinson to Horton.

Fourth. That the approval of the President of the United States of the deed from Joseph Robinson to John F. Horton, notwithstanding the same was made after the death of Horton, made the same a valid conveyance, and such conveyance inured to the benefit of the grantee of Leon Strauss, as administrator of the estate of said Horton, deceased.

The court refused each and all of said propositions, the plaintiff excepted, and thereupon the court found the issues for the defendants and finally entered judgment on the finding. (Rec., 88.)

Which judgment the Supreme court of Illinois affirmed (Rec., 90), giving an opinion set out in full (Rec., 90–94), with a dissenting opinion by Judge Sheldon. (Rec., 95, 96.)

Whereupon the plaintiff brings the case by writ of error to this court.

Assignment of Errors.

(Rec., 101.) The Supreme court of Illinois erred in holding that article four (4) of the treaty between the United States of America and the united nations of the Chippewa, Ottawa and Pottawatomie Indians of the

waters of the Illinois, Milwaukee and Manitouck rivers, made and concluded at Prairie du Chien, in the Territory of Michigan, on the 29th day of July, 1829, a conveyance could not be made by Joseph Robinson, one of the children of Alexander Robinson, named in said treaty, so as to convey any title, even though the President of the United States approved of such conveyance after the same was executed and delivered.

Second. The said court erred in holding that the deed from Joseph Robinson to Horton, mentioned in the record, was void.

Third. The said court erred in holding that Joseph Robinson had no authority to convey, without obtaining the permission of the President, before such conveyance was made.

Fourth. The said court erred in holding that the subsequent sanction of the President, obtained by persons claiming title under Robinson, of the deed of Robinson was invalid.

Fifth. The judgment of said Supreme court and order affirming the judgment of the Superior court of Cook county, in said state, was contrary to the law and evidence in the case.

Sixth. The said court erred in holding that the plaintiff in error obtained no right, title or interest in the lands in controversy in this suit through the conveyance of Joseph Robinson under the fourth article of said treaty.

Seventh. The said court erred in not reversing the judgment of the Superior court of Cook county.

POINTS.

I.

Neither the treaty of July 29, 1829, nor the patent issued to Robinson under it, prescribes the form in which the President shall give his permission, and in such case he can give it in such form as his discretion may dictate.

Article IV, Treaty of July 29, 1829; 7 U. S. Stat. at Large, page 321.

Doc. dem. Godfrey v. *Beardsley*, 2 McLean, 412.

Ashley v. *Eberts*, 22 Indiada, 55.

Steeple v. *Downing*, 60 Indiana, 478.

Murray v. *Wooden*, 17 Wendell, 531.

Jackson v. *Hill*, 5 Wendell, 522.

The case on which the Supreme court of Illinois rested is very different, as in that case the form has been prescribed by law.

Smith v. *Stevens*, 10 Wallace, 321.

Act of May 26, 1860; 12 U. S. Stat. at Large, page 21.

The general mode of procedure since a time considerably prior to the date of the Indian's deed in the case at bar, has been the course followed in this case. To such an extent that it may without violence be claimed that the President has authorized it to be understood that alienations may be made, provided the deed is submitted to him for approval or disapproval afterwards.

See Opinions of the U. S. Attorneys General, Vol. 2, pages 465 and 631. Vol. 3, pages 209, 260 and 518.

The death of the grantee of the Indian is of no moment with regard to the time of the approval being given.

See

Steeple v. *Downing*, 60 Indiana, 478.

II.

The deed from the Indian takes effect by *relation* from its date, when once approved by the President.

Doe dem. v. *Wilson*, 23 Howard, 457.
Ross v. *Borland*, 1 Peters, 655.
Jackson v. *Ramsay*, 3 Cowen, 75.
Steeple v. *Downing*, 60 Indiana, 496.

III.

AUTHORITIES.

The following cases illustrate the law applicable to the case at bar:

In the case of *Ex. Dem. Godfrey* v. *Beardsley*, 2 McLean, 412, there was before the court the construction of similar language in an Indian treaty between the United States and the Ottawa, Chippewa and Pottawatomie Indians, dated August 29, 1821.

The language of that treaty is very nearly like that in the treaty in question in this case. It is as follows:

"The land herein stipulated to be granted shall never "be leased or conveyed by the grantees, or their heirs, "to any persons whatever, without the permission of the "President of the United States."

The plaintiff's lessor proved title from Pierre Moran (one of the reservees), by deed, dated February 2, 1827, and permission by John Q. Adams on the 28th day of November, 1826.

The point taken in that case is exactly opposite to the position taken in the case at bar. Because the permission was endorsed upon a petition for leave to sell, instead of upon the deed approving of it, it was insisted that the sanction given by Mr. Adams was informal and invalid. Justice McLEAN, who had a large experience in such matters, says, in holding the approval of the President good in the mode adopted: "Neither the treaty nor any "law prescribes the form in which this sanction should "be given. The treaty imposed the duty upon the Pres- "ident, and he could execute it in such form and manner "as his discretion should dictate. Now, when this power "is so exercised, how can the form be objected to? Can "the judiciary declare the act invalid because the form "in which it is done is not exactly in the manner they "would have prescribed? The executive, as an independ- "ent branch of the government, has the same right to "adopt its own forms in the performance of its own "duties as the judicial or legislative departments. The "law-making power may prescribe the form in which "judicial or executive duties shall be done, but where a "duty is enjoined, and this is omitted, the discretion of "the department as to the mode, must be exercised. Ex- "cept by permission of the President, Pierre Moran "could not convey this land. That permission was ob- "tained before the deed was executed. Now, whether "it would have been judicious to have withheld the sanc- "tion until the execution of the deed is a matter about "which differences of opinion may exist. But whether

"given before or after the deed, it is equally within the "power of the President."

The reasoning of the court in the case cited, is unanswerable; it could not be better stated, and is, in our judgment, conclusive of the case at bar. Afterwards in the case of *Lowry* v. *Weaver*, 4 McLean, 82, the same judge had occasion to consider similar provisions in St. Mary's Treaty, 1818, where title came through John W. Burnet, one of the reservees. The treaty contained the limitation that the lands granted to Burnet and his heirs, should never be conveyed without the consent of the President of the United States. Burnet died in 1826, owing Fielding Lowry a sum of money, for which Lowry held Burnet's note. Administration was granted by the Probate court of Tippecanoe county, Michigan, to one Weaver. Lowry filed his note, proved his claim, and there being insufficient personal property, the usual proceedings to sell lands to pay the debt were had, and part of the Burnet lands were sold, and bought by Lowry. The proceeds of sale of the lands were insufficient to pay the claim. Lowry sold part of the lands, bought by him, at the administrator's sale, to Weaver, who paid part of the consideration money, and the residue was reserved until Lowry should get the approval of the President in the deed, from the administrator to him. Application was made to the President for his approval, and he refused because a partition had been had, and the lands in question set off to Rebecca Burnet, one of the heirs, and by her sold to one Palms, who claimed title.

The learned judge held in this case, that the debts of Burnet were a lien on these lands, and that they might be sold, and a good title would pass without the permission of the President. No question at all was made as to

the form of the approval, either by the executive or before the court. The policy of the government is discussed, and the restriction upon conveyances in such cases was considered by the court to be that of paternal guardianship, subject to which the Indian could do business and contract debts, for which his estate would be liable, and the end of the law was deemed to be fully answered by exercising supervision over conveyances attempted to be made; the conditions of the grant being "limited to "the personal acts of the grantee and his heirs." This case, although not directly in point, is instructive as to the spirit and purpose of these limitations, and is in perfect harmony with the views we are endeavoring to maintain in the case at the bar.

In the case of *Murray* v. *Wooden*, 17 Wendell, (N.Y.), 531, two deeds had been executed, and each had been approved by the surveyor general, according to the laws of the State of New York. The deed of earliest date was last approved, but it was contended that it should take effect by relation as of the date of the first deed.

The court held that it was not necessary that the deed should be approved at the time of its execution, and that it was good from the time of its approval, but held that the first deed which was approved would convey the lands, and that the doctrine of relation could not be applied. This would seem to follow from the laws of that State, and the policy there prevailing, also from the fact that another deed had been given and had been approved at the time of the approval of the deed of prior date. It would be inequitable to apply the doctrine under such circumstances. Besides this, the fact that the laws of that state at an early day declared it to be a public offense to purchase or contract for the purchase of land within

that state from any Indian or Indians residing within the limits of the state, and that this prohibition as a fundamental principle was preserved in all subsequent changes of the law prior to the decision of that case, would remove the last vestige of any ground to support the doctrine of relation.

See,

Jackson v. *Wood*, 7 Johnson, 295.
Chandler v. *Edson*, 9 Johnson, 362.
Goodell v. *Jackson*, same, 486.

With statutes positively prohibiting contracting with Indians and making it an offense to do so, and the intervention of the rights of a third party, through a perfected deed, in the case of *Murray* v. *Wooden*, *supra*, it will hardly be contended that the case is an authority against the application of the doctrine of relation, while it is authority in favor of the validity of a subsequent approval by the President.

In the case of *Harris* v. *Doe*, 3 Ind., 494, there was similar limitation under consideration. The approval of the President had not been obtained. It was contended that a subsequent approbation of the President might have made the deed good, and that it was voidable merely, but the court say: "There is, however, no "proof of any subsequent approbation. We think, "therefore, in this case the title to the premises in con- "troversy is shown to be outstanding in the heirs of Jo- "sette Beaubien."

The validity of a subsequent approval is implied, and the effect of a subsequent ratification is not discussed.

In the case of *Chinnubee* v. *Nicks et al.*, 3 Porter's R. (Ala.), 362, it appears that under an Indian treaty dated

March 24, 1832, between the United States and the Creeks, Chinnubee, chief of the Creek tribe, had a right to certain lands. On the 10th of September, 1834, he conveyed by his deed all his right and interest in the land to the defendants, and the proper agent on the same day made his certificate on the deed that the price paid by them was the full value of the land. On the 15th of October, 1834, Chinnubee died, and on the first day of November in the same year, the President of the United States approved of the contract. The case arose upon an application of the widow of Chinnubee for dower in the lands. The court say: "The approval of the con-"tract by the President after the death of Chinnubee "could be properly given. He did in his life-time all that "was required of him. When he delivered it nothing "was necessary to complete it as a contract. The ap-"proval when given was no part of the contract, but the "opinion of the President that the contract of Chinnubee "was valid." We do not claim the case to be directly in point, as the death of Joseph Robinson, the grantee, had not intervened in the case at bar, but here seems to be a recognition of the fact that the approval may have a retroactive effect.

The case of *Steeple* v. *Downing*, 60th Ind., 478, arose under a treaty of August 29, 1821 (7 U. S. Stat. at Large, p. 218), in which land was granted to the children of Pierre Moran, a Potawattomie chief.

The land by the terms of the treaty could not be conveyed by the grantees without the consent of the President of the United States.

On June 3, 1834, the grantees conveyed their reservation to Rufus Downing who died soon thereafter.

On June 26, 1857, the President of the United States endorsed his approval upon the deed to Rufus Downing.

The children of Rufus Downing brought the suit to obtain possession of this land. The court said in deciding the case: * * * "When the deed from the children "of Pierre Moran to Downing was approved by the "President, the approval related back to the time of the "execution of the deed, and vested the title in Rufus "Downing from that time."

Citing,

Ashley v. *Eberts*, 22 Ind., 55.
Board of Trustees et al. v. *Reinhart*, 22 Ind. 463.
Summer v. *Coleman*, 23 Ind., 91.

And the court say: "The title to the land, therefore, "by relation vested in Rufus Downing in his life-time.

"As the deed was produced by his heirs, it will be "presumed to have been properly delivered; and we are "of opinion that no new delivery was necessary after the "approval of the deed by the President."

ARGUMENT.

I.

Neither the treaty of July 29, 1829, nor the patent issued to Robinson under it, prescribes the form in which the President shall give his permission, and in such case he can give it in such form as his discretion may dictate.

It is desirable to bring before your Honors the question raised in the record of this case, which involves a construction of that part of Article IV of the treaty between the United States of America and the united nations of Chippewa, Ottawa and Pottawatomie Indians of the waters of Illinois, Milwaukee and Manitouck rivers, made and concluded at Prairie du Chien, on the 29th day of July, 1829, which provides that the tracts of land therein granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States. (Rec., 35.)

U. S. Stat. at Large, Vol. 7, p. 321.

The treaty article to be construed reads as follows, omitting what is not applicable:

"Article IV. There shall be granted by the United "States to each of the following persons (being descend- "ants from Indians) the following tracts of land, viz.:

"To Claude Laframboise, one section of land on the "Riviere Aux Plaines, adjoining the line of the purchase "of 1816.

"To Francois Bourbonne, Jr., one section at the mis- "sionary establishment on the Fox River of the Illinois.

"To Alexander Robinson, for himself and children, "two sections on the Riviere Aux Plaines, above and ad- "joining the tract herein granted to Claude Laframboise."

* * * * *

Here follows further grants to sundry individuals.

* * * * *

"The tracts of land herein stipulated to be granted "shall never be leased or conveyed by the grantees or "their heirs to any persons whatever, without the permission of the President of the United States."

The trial judge in the Superior court of Cook county, in the case now at bar, held that Robinson, the Indian, one of the children of Alexander Robinson mentioned in the above article of the treaty, had no authority to convey without obtaining the permission of the President, beforehand. And that the subsequent sanction obtained by persons claiming title under Robinson, was invalid, and this decision was, we submit, erroneous.

Neither the treaty nor the patent issued under and in conformity with it, provides any method for the President to follow, in order to signify his permission to the Indian to convey. Nor has any law, subsequently passed or previously in force, prescribed the form in which the sanction should be given.

The treaty imposes a duty upon the President and he has the right to execute that duty, in such form and manner as his discretion shall dictate.

The executive as an independent, co-ordinate branch of the government, has the same right to adopt its own forms and manner in performing its own duties, where the law has prescribed no special form and manner, as the other departments.

It is true the law-making power might prescribe the forms under which executive or other duties shall be done, by statute duly enacted, or in the law imposing the duty; in many cases it has so prescribed them, but where a duty is enjoined, and the laws are silent as to the forms under which or the manner in which it shall be done, the discretion of the department charged with the duty, as to these forms and manner must be exercised, and cannot be subject to review, objection or dictation by some other department equally independent and co-ordinate, even though in the opinion of that other department some other and different form and manner of doing it, is to be preferred.

See *Doe dem. Godfrey* v. *Beardsley*, 2 McLean, 412

where a treaty containing precisely identical words as the treaty in the case at bar was construed by the court.

See also *Ashley* v. *Eberts*, 22 Indiana, 55.
Steeple v. *Downing*, 60 Indiana, 478.

In which last case, as in the case at bar, the grantee of the Indian died long before the approval of the President was given to the deed, which approval was more than twenty years after the date of said deed.

See also
Murray v. *Wooden*, 17 Wendell, 531, 539.
Jackson v. *Hill*, 5 Wendell, 532.

The case on which the Supreme court of Illinois rested as authority for its decision affirming the judgment of the lower court is totally dissimilar, we submit, to the case at bar.

See *Smith* v. *Stevens*, 10 Wallace, 321.
affirming the case,
Stevens v. *Smith*, 2 Kansas, 243.

In this case, a treaty with the Kansas Indians provided that the Kansas Nation should never sell, relinquish or in any manner dispose of the lands reserved, to any other nation, person or persons, whatever, without the permission of the United States for that purpose first had and obtained, etc.

Sec. 7, Stat. at Large, 244, 245.

And the method in which said permission should be given, was subsequently prescribed by the act of May 26, 1860.

See 12 U. S. Stat. at Large, 21.

By that law the Secretary of the Interior, when requested, should be authorized to sell such lands, etc.

One of the reservees, Victoria Smith, on August 14, 1860, conveyed her reservation to one Stevens, who went into possession. The Kansas court held the conveyance void on Victoria Smith's having brought ejectment against Stevens, and this court affirmed the judgment, Mr. Justice DAVIS in the opinion delivered, using the following language:

"It needs no argument or authority to show that the "statute, having provided a way in which the lands could "be sold, by necessary implication, prohibited their sale "in any other way. The sale in question not only con- "travened the policy and spirit of the statute, but violated "its positive provisions."

The obvious distinction between this case and the case

at bar, is that in the Kansas Treaty, the permission is prescribed to be first had and obtained, and the subsequent law specially provided the way in which the lands could be sold, while in the treaty and patent on which we ask for a construction, no way is prescribed whatever.

Unless the language used in treaty and patent in itself unmistakably indicates a special course to be followed, the right of the President to prescribe such course as in his discretion seems best,cannot, we submit, be for a single moment contested; permission does not by any means necessarily imply prior action or leave sought and given. Such a restriction is far too narrow, and leave out of account all those senses of the word which involve the standing by and allowing a thing to be done, with or without protest or objection.

The courts have always held that these limitations upon the power of the Indians to convey, are solely for their protection, and the usual, if not universal course pursued by the executive since a time considerably anterior to the date of the deed from Robinson to Horton in this case, has been for the President to signify his permission, by approving the deed when duly presented to him by the purchaser, together with certain affidavits and certificates showing the *bona fides* of the transaction, etc., or if he sees reason therefor, or cause to suspect the fairness of the deal, disapproving and by so doing, rendering the deed nugatory.

If there is to be question as to the precise shade of meaning to be attached to the words used, it may not be improper to call attention to the fact, that the limitation does not extend to forbidding a sale or contract to sell, which necessarily precedes the conveyance, but forbids the Indian from conveying without the permission of the

president, and the method adopted in the great majority of cases of this kind, is that which it would seem best calculated to most surely protect the grantor, for it requires that he shall have received his consideration, and throws the burden of obtaining the necessary sanction on the grantee, from whose possible unfairness it is intended to protect him, leaving the Indian alone in a position to act unfairly, if he is disposed so to do.

The cases in the various reports of different courts, though not very numerous, almost all arise where the approval has been given to the deed, which is recognized as the usual course of proceeding; the general course of procedure in the Indian Bureau, for many years has been, we confidently believe, the course which was followed in the case at bar, and there are numerous opinions of the Attorneys General of the government, all asserting that such course is the regular one.

To such an extent is this true, that it may very reasonably, we think, be claimed that the President has authorized it to be understood, has published it to the world in other words, that all alienations by Indians, where his sanction is necessary to finally effectuate a conveyance, shall be allowed and permitted, provide, the deed is finally submitted to him for approval.

See Opinions of the Attorneys General. Vol. 2, pp. 465 and 631. Vol. 3, pp. 209, 260 and 518.

And in some cases where petitions have been presented for leave to convey, the President has approved upon the condition that the deeds when executed should be submitted to him for approval, before the sanction was to be held to be finally given.

And in all cases known of in Cook county where there are several Reserves under the treaty of July 29, 1829, covering several thousand acres, the sanction made necessary, has been evidenced by subsequent approval of the conveyance.

It may be also suggested that the approval by the President of the deed by no means negatives the possibility that permission had been in some way given previously. And it is by no means a strained presumption to assume that such permission was given, and that the approval of the deed is to evidence the same. It will not, we think, be pretended that the President might not give his permission verbally; the only difficulty in case of such a permission being, the difficulty of proving the same, with which the executive has nothing to do, and it is undoubted that his permission may be implied by acts or otherwise.

The fact that at the date of the President's approval, the grantee in the deed from the Indian had died will not affect the validity of the approval.

See

Steeple v. *Downing*, 60 Indiana, 478,

where the grantee of the Indian had been dead some twenty years; nor will the time which elapsed between the date of the deed and the approval affect the validity of the act of the President simply because of its duration, for in the case cited, twenty-three years intervened, while in the case at bar only thirteen had elapsed.

The requirement of the sanction of the President is for the sake of protecting the Indian, as a safeguard of his interest against fraud, imposition and his own improvidence, and the evidence shows that all of these questions

were carefully looked after and provided against, when and before the approval was given.

See record,

(Exhibit C½) pages 20–26.

II.

The deed from the Indian takes effect by relation from its date, when once approved by the president.

It is proper, we think, also to consider, whether the deed from Robinson, the Indian, to Horton (Rec., 16), when once approved by the President, takes effect as of the date when originally executed by Robinson, or as of the date of the President's approval. (Rec., 19.)

This point is not noticed by the Supreme court of Illinois, which confines itself, in the opinion delivered, (Rec., 90) to deciding upon the validity of the deed without the President's approval, holding that such approval as the deed showed, was not a compliance with the conditions upon which a sale might be made, again failing to note that the treaty and patent do not forbid a sale, or contracting to sell, but simply provide that no conveyance should be made without the permission of the President, that is, that no sale should be consummated by conveyance without such permission.

Perhaps no one would hold that in every instance, the approval makes the deed effective from its date, as so to hold without any qualifications, would be to allow a subsequent approval to destroy a title acquired by a later deed duly approved at a date prior to the approval of the earlier instrument. Yet in such a case, the approval would not have rendered the deed to Horton valid as of

any date, for it would be wholly nugatory, as the permission of the President as to the alienation of the land in question would have been already exhausted.

Certainly the death of the grantee can no more affect the date at which the deed once approved is to take effect than it can affect the validity of the approval, as a mode of evidencing the permission of the President, required by the treaty and patent.

The doctrine of relation is one well known to this court, as a well established principle, that all the several parts and ceremonies necessary to complete a conveyance, shall be taken together as one act and operate from the substantial part, by relation.

See

Doe dem. v. *Wilson*, 23 Howard, 457.

The fiction of relation is that an intermediate *bona fide* alienee of the incipient interest may claim that a patent inures to his benefit by an *ex post facto* operation. See

Ross v. *Borland*, 1 Peters, 655.
Jackson v. *Ramsay*, 3 Cowen, 75.
Steeple v. *Downing*, 60 Indiana, 496.

In this last case the Supreme court of Indiana held in a case precisely similar in its facts to the case at bar, that the doctrine of relation vested the title, upon the approval given, in the grantee of the Indian, in his life-time.

And it would seem that, if the mode adopted by the President to signify his permission is valid, the doctrine of relation must apply, and the deed of the Indian take effect as of its date, when once approved, and the title would then inure in the plaintiff in error being a *bona fide* alienee.

Supreme Court, U. S.
FILED
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OF THE

OCTOBER TERM A. D. 1891.

AQUILA H. PICKERING,
Plaintiff in Error.
vs.
JOHN A. LOMAX AND WILLIAM KOLZE,
Defendants in Error.

Writ of Error to Supreme Court, State of Illinois.

BRIEF FOR DEFENDANTS IN ERROR.

ROBERT HERVEY,
Attorney for Defendants in Error.

CHICAGO, ILL.
M. G. Lampkins, Legal Printer, 84 Washington Street.
1892.

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Defendants in Error.

Writ of Error to Supreme Court, State of Illinois.

This is a writ of error to the Illinois Supreme Court to reverse a judgment of that Court, and the jurisdiction of this Court is invoked for the reason that the proper decision of the contents of a treaty of the United States with certain tribes of Indians as well as the restrictions on the alienation by them of certain lands contained in the patent from the United States conveying said lands to one of the members of one of the Indian tribes, (Alexander Robinson), through whom by numerous

mesne conveyances, the plaintiff in error claims title, presents a federal question and confers jurisdiction on this Honorable Court.

I dispute the correctness of this position. The Court will observe that the *title* to the lands did not pass to the Indians by the treaty. It only contained *an agreement* on the part of the government to convey, which did not pass a legal title. It was at most an equitable one.

The *legal title* remained in the United States until the issuing of the patent nearly fifteen years afterwards. And then the limitation on the power of the patentees to convey formed a most important part of it, and this limitation clearly expressed in the patent, the Supreme Court of Illinois construed in the proceeding before it. The action was an action of ejectment brought by the plaintiff in error and in which, as a matter of law, only the *legal title* could be considered. The Court of Illinois in the exercise of its undoubted powers decided adversely to the rights of the plaintiff in error. The question presented and decided was one exclusively within the jurisdiction of the Illinois Court, dealing as it did with a conveyance of real estate within its territory. The terms of the treaty of fifteen years before had no bearing upon the question. The only question was the proper construction of the limitation or power to convey contained in the patent. This was the question which had been submitted to the Court below, and was *the* question, and I claim the sole question presented to and decided by the Supreme Court of Illinois. The treaty, I submit, cut no figure and cannot, I claim, be urged as a foundation for the jurisdiction of this Court.

And thus, it seems to me, this serious question arises, at the *very threshold of this enquiry*, and which, I beg

most respectfully to present for the consideration of this Court, whether, inasmuch as the titles to, and the conveyances of real property within any of the States, are exclusively matters for State jurisdiction, and as the Supreme Court of Illinois has in construing the deed from Robinson (the Indian) to Horton, his grantee, decided that *no title passed from Robinson to Horton for want of the permission of the President of the United States* for the conveyance, in apt time, my contention is that the decision of the Supreme Court of Illinois, settling as it does a question of the ownership of land within the State, and within, as I insist, the sole control of the Illinois Court, is final and conclusive, and that in a case of this character, this Court ought to follow and be bound by it, and that the writ of error in this cause ought to be dismissed for want of jurisdiction in this Honorable Court.

In what cases this Court does and does not follow the decisions of the State Courts. See opinion of the late Mr. Justice Davis in the case of the *City of Chicago* v. *Robbins*, 2 Black. 418.

The Court will observe that the limitation on the power of the Indians to convey is not only contained in the treaty, but it also appears in and is made a part of the patent granting the land, and which, I claim, is express notice to all persons dealing with the title, of whom the plaintiff in error is one. This title derived through this patent which contained the limitation on the power to convey referred to, and which as the record shows is in these words: "But never to be leased or conveyed by "the grantees or their heirs *without the* PERMISSION of the "President of the United States."

This patent containing this limitation on the power of the grantee and his heirs to convey, was the foundation

of the title of the plaintiff in error, and was before the Supreme Court of Illinois, which, (after setting out the various conveyances under which the plaintiff in error claimed title, from the patent issued in 1843, down to the deed from Henry H. Dyer and wife to him dated November 10, 1866,) says, (Ills. Reports Vol. 120, page 293,) *Pickering* v. *Lomax:*

"The treaty under which the lands were granted to "Alexander Robinson (an Indian) and his children was "concluded 29th of July, 1829. Whether the deed exe- "cuted August 3, 1858, from Joseph Robinson, (who "was a son of Alexander Robinson and wife, and acquired "title to the lands in question in severalty by partition "proceedings in a Cook County Court of competent "jurisdiction) to John F. Horton without the *permission* "of the President of the United States was sufficient to "pass the title to the lands attempted to be conveyed "involves a construction of the last clause of the treaty "set out above, and also of that clause in the patent "prohibiting a conveyance without *permission* of "the President. The object of the condition in "restraint of a sale is manifest. It was de- "signed for the benefit and protection of the Indian as "a safeguard to protect property bestowed upon him "against fraud, imposition and his own improvidence in "the disposition of his lands. The wisdom of such a "provision in view of the condition of the Indian at the "time and his liability to be defrauded out of his property "unless the protecting hand of the government was inter- "posed in his behalf is not, nor can it be questioned. It "is true that the patent issued to Robinson granted the "fee in the lands, and we are not unmindful of the fact "that a limitation upon the fee as a general rule is con-

"trary to the policy of our law. But we think it well "settled in a case of this character that effect will be "given to conditions imposed in a treaty and a patent "issued by the government in pursuance of a treaty made "with the Indian tribes. The patent under which Rob- "inson and his children derived their title to the land "prohibits a lease or conveyance by all or either of them "without the *permission* of the President of the United "States. The grant was made in pursuance of a treaty "between the government and the Indian tribes upon this "condition."

This mode of conveyance having been provided, *by necessary implication any other is prohibited, and being prohibited, it would seem to follow that the deed was invalid and passed no title.*

The Illinois Court then cites with approval and as sustaining its view, the decision of this Court in the case of *Smith* v. *Stevens*, 10 Wallace, 321. There a treaty was concluded by the United States with the Kansas Indians in June, 1825, after providing in the sixth article that there should be reserved to each of the half-breeds (the plaintiff, Victoria Smith, being one of them) certain lands. It was provided in the eleventh article of the treaty that the Indians should never sell or dispose of the lands reserved without the *permission* of the United States for that purpose first had and obtained. Subsequently, in 1860, Congress passed an act referring to the treaty of 1825, reciting that the lands had been surveyed and allotted to each of certain half-breeds in accordance with the sixth article of the treaty, *and that all the title, interest and estate of the United States is hereby vested in said reservees.* The second section of the said act of Congress provided for the manner in which such lands

might be sold through the Secretary of the Interior, and prescribed the form of proceeding.

After the passage of this act of Congress, Victoria Smith, one of the half-breeds, being in possession of her tract, executed a deed purporting to convey it to one Stevens, who went into possession.

There was no compliance with the requirement of the act of Congress as to conveying by the reservees.

Victoria Smith afterwards brought an ejectment against Stevens, who defended, setting up his deed from the plaintiff, but the State courts in Kansas held his deed was void, and this ruling was affirmed by the Supreme Court of the United States—10 Wallace, 321.

It will be observed by the Court that in the Kansas case there was no limitation of the power to convey as in the patent in the case at bar. The act of Congress granted the entire title of the government to the Indians.

The Illinois Supreme Court commenting on this case adds: "In the case cited the treaty provided that the "lands reserved should not be conveyed without the con- "sent of the United States, and the act of Congress subse- "quently passed vested the title in the Indians or half- "breeds and provided for a sale by the Secretary of the "Interior on the request of the Indians.

"This mode of sale was disregarded and an absolute deed "made without the consent of the Secretary of the Interior, "while in the case under consideration the treaty *and* "*patent* require the consent (permission) of the President "to a sale. It seems plain that the rule which should con- "trol one case should be binding in the other. In dis- "posing of the case in the Supreme Court it is said: It "was considered by Congress to be necessary in case the "reservees should be desirous of relinquishing the occupa-

"tion of their lands that some method of disposing of them "should be adopted which would be a safeguard against "their own improvidence, and the power of Congress to "impose a restriction on the right of alienation in order to "accomplish this object cannot be questioned."

It is also said, "the sale in question not only contravened "the policy and spirit of the statute, but violated its posi- "tive provisions. The conclusion of the Court is that "under the treaty and law in force at the date of the deed "Victoria Smith had no power to sell, and as the Sec- "retary of the Interior never authorized the sale or con- "sented to it, the sale was void and the deed passed no "title.

"Here the deed was made, as was said before, without "the permission of the President and in violation of the "treaty and the provisions of the patent, and if no title "passed in the case cited, as was held, for the same reason "we must hold no title passed in this case.

"It is true that *thirteen years* after the deed in ques- "tion was made, and after the death of the grantee, "it was approved by the President. We do not regard "this as a compliance with the conditions upon which a "sale might be made. The sale was consummated, if at "all, upon the execution and delivery of a deed. The "validity of this act required the consent of the President. "It was not obtained and the act was nugatory and could "not be validated by any *subsequent* attempted approval."

The undisputed facts in this case are:

1st. Indian treaty concluded at Prairie du Chien between the United States and the Ottawa, Chippewa and Pottawatamie Indians, dated 29th July, 1829.

2d. Article 4 of said treaty *agrees to convey* to Alex-

ander Robinson (an Indian) for himself and his children (one of whom was Joseph Robinson, through whom by numerous *mesne* conveyances plaintiff in error claims title,) certain lands covering the land in question in this cause.

3d. That the in part recited treaty contains the following: "The tracts of land herein stipulated to be "granted shall *never* be leased or conveyed by the "grantees or their heirs to any persons whatever *without* "*the permission* of the President of the United States."

4th. The lands described in the treaty referred to were in 1843, during the presidency of President Tyler, conveyed by patent from the United States to "Alexander "Robinson for himself and children, but never to be "leased or conveyed by him, them, or his or their heirs to "any person whatever without the *permission* of the "President of the United States."

5th. Partition proceedings in Cook County Court of Common Pleas, between Alexander Robinson and his children, by which a certain portion of the lands patented and which included the premises in question in this cause were set off in severalty to Joseph Robinson, a son.

Petition filed February 22, 1847.

6th. Warranty deed, dated August 3, 1858, recorded July 18, 1861, from Joseph Robinson and wife to John F. Horton, conveying the land in controversy, consideration $4,100.

This deed was not presented to the President (who then was Mr. Buchanan), nor to any of his successors *till January 21, 1871*, when it was presented to and

sanctioned by the then President of the United States (General Grant).

7th. John F. Horton (the grantee of Joseph Robinson) died intestate August 1, 1861.

8th. Proceedings in Probate Court of Cook county, Illinois, in the estate of John F. Horton, deceased, to sell the interest of the deceased in the lands in question for payment of debts and sale thereon to Moses W. Baer *for $318.53*, and deed from the administrator to him.

9th. Then various conveyances from many parties claiming some right until November 10, 1866, when a warranty deed was made from Henry H. Dyer and wife to the plaintiff in error; consideration, $1,600; recorded November 23, 1866.

ARGUMENT.

I claim that the provisions of the treaty cited, and the limitation on the powers of the grantees in the patent referred to, mean, that in order to effectuate a conveyance the required *permission* of the President of the United States must be had *in advance* or at all events contemporaneously with the conveyance. The word used, *permission*, in any view clearly indicates that as the proper construction, the word *permission* means *giving leave*, and that is the meaning of the word *permit* derived from the Latin verb *permitto* and the French verb *permettre*, which both signify to *give leave*.

Webster's Dictionary, "permit," "permission," "to give leave," "giving leave." In this case the sanction of President Grant to the conveyance by Joseph Robinson to John F. Horton was given over thirteen years *after*

the date of the deed and over *twelve* years after the death of the grantee, Horton, and nearly *ten* years after the administrator of Horton had conveyed what title Horton had to the lands in question.

In support of this view I refer the Court to the following cases:

Doe ex dem Godfrey v. *Beardsley*, 2 McLean, 412, where the deed was approved by the President of that day before its execution and where the Court in considering the question now under discussion uses this language: "Except by permission of the President, Pierre "Moran (the Indian grantee) could not convey this land; "that permission was obtained *before* the deed was ex- "ecuted. Now whether it would have been more judi- "cious to have withheld the sanction *until* the execution "of the deed is a matter about which differences of opin- "ion may exist, but whether given before or after the "deed it is equally within the power of the President. "It may be proper, however, to remark *that as the con- "veyance could not be made without the permisson, it "would seem that the permission* should *precede* the execu- "tion of the deed." 2 McLean, 419.

To the same effect is the case of *Doe ex dem Harmon* v. *Partier et al.*, 12 Smedes and Marshall (Miss.) 425.

There the question arose on the validity of a deed from an Indian without the sanction of the president as required by the terms of the Indian Treaty before the Court in that case. The Court in giving judgment says—page 427: "There seems to be no way of dispensing with the approval "of the President. It is a treaty of stipulations and "constitutes *a condition precedent to a perfect title. Until "that is obtained the title cannot be said to be executed. "It is a law of the property, it must be conveyed in a pre-*

"*scribed form or no legal title passes.* The Indians them-
"selves thought proper to place this restraint on the
"power of alienation. It is not for us to say whether it
"was wise or unwise, necessary or unnecessary. It is a
"positive provision in a paramount law, and there is no
"way of arguing against it.

"It is enough for us to know that this is the law pre-
"scribed by competent authority." On page 428 the Court
"adds: "The power to alienate is but an incident to the
"ownership of the soil, and the Supreme power may always
"prescribe the forms and ceremonies to be observed in
"alienating."

But it is urged by the learned counsel for the plaintiff in error that subsequent sanction of President Grant to the conveyance by Joseph Robinson to Horton was a compliance with the provisions against alienation without *permission* contained in the patent, that it related back to the date of the deed and perfected the title of the plaintiff in error. Now I beg to show how unsound on every principle this contention is. Aside from the lapse of time between the date of the deed from the Indian and the sanction by the President (13 years) and the death of the grantee of the Indian 12 years before, let us see what the effect of the doctrine of relation as contended for by the counsel for the plaintiff in error would be on the title of the plaintiff in error.

It is claimed by the counsel for the plaintiff in error that their client took title by the application of the doctrine of enurement.

The law of Illinois on that subject is found in Chap. 30, Sec. 6, Revised Statutes of Illinois, Hurd's Revision, 1891, page 349, where it is provided as follows:

"AFTER-ACQUIRED TITLE, WHEN IT ENURES."

"If any person shall sell and convey to another by "deed or conveyance, *purporting to convey an estate in "fee simple absolute* in any tract of land or real estate, "lying and being in this state, not then being possessed "of the legal estate or interest therein at the time of the "sale and conveyance, but after such sale and conveyance "the vendor shall become possessed of and confirmed in "the legal estate to the land or real estate so sold and "conveyed, it shall be taken and held to be in trust and "for the use of the grantee or vendee, and the conveyance "aforesaid shall be held and taken and shall be as valid "as if the grantor or vendor had the legal estate or in-"terest at the time of said sale or conveyance."

Now I contend most respectfully, your Honors, that under the fact, as shown in this record there cannot be, under the laws of Illinois, any enurement of the title of Horton, the grantee of Robinson the Indian, in favor of the plaintiff in error for this obvious reason, that an administrator's deed, executed under an order of Court for the payment of debts, as in this case, does *not purport to convey an estate in fee simple absolute*, as required by the law of Illinois as a foundation for the application of the doctrine of enurement, but simply conveyed what estate or interest the deceased had in the lands sold by his administrator, and therefore that the claim of the counsel for the plaintiff in error, that the title of Horton sold by his administrator and conveyed by an administrator's deed, enured to the benefit of their client, the plaintiff in error, cannot under the law be sustained, even giving full force to their contention as to the effect of the very tardy sanction of the President to the conveyance by Robinson by relation, back to the date of the execution of the deed.

And on the contrary I respectfully submit that if the doctrine of relation is applied as claimed, which I contend under the authorities and terms of the treaty and limitation on the power to convey contained in the patent and the proper construction of the word used (*permission*), it cannot be, then the legal effect of validating the deed of Robinson to Horton, who never conveyed the land by any deed purporting to convey a fee simple absolute, and which was certainly not the effect of the deed of his administrator, would be to vest the title not in the plaintiff in error, but in the heirs and legal representatives of Horton.

To recapitulate I contend:

1st.—That the conveyance from Joseph Robinson to John F. Horton, not having been *permitted* by the President of the United States before or at the time of its execution, was under the authorities cited, and on the proper construction and meaning of the word *permission* and in the words of the Supreme Court of Illinois in this case, "the act was nugatory and could not be validated by any subseqent attempted approval."

Pickering v. *Lomax et al.*, 120 Illinois, at pages 295–6.

That the proper meaning of the word *permission* is *giving leave to do an act in advance or contemporaneously*, not ratifying it or attempting to sanction it years after it was done. See Latin, *permitto*; French, *permettre*. That the terms of the treaty being merely *an agreement* on the part of the United States to convey and not creating a *legal* title, were unimportant in an action of ejectment where the *legal* title alone is in issue.

That if the tardy approval of the President was effective and had relation back to the time of the execu-

tion of the deed, that, under the law of Illinois would not help the plaintiff in error, because the deed from the administrator of Horton, through which he claims, is *not* a deed *purporting to convey the fee simple absolute*, which no administrator's deed does, and that if the approval by President Grant in 1871, of a deed made by an Indian in 1858, whose power to convey was limited by the express terms of the patent, and on which point I have made all the argument that I deem necessary, had any effect by relation, it was in favor of the heirs of John F. Horton and not of the plaintiff in error.

I do not think that I can usefully add anything to what I have already urged, but will conclude what I have to say by claiming, that in my view the judgment of the Supreme Court of Illinois is, under the facts in evidence and the law of the case, correct, and I respectfully submit that it ought to be affirmed.

ROBERT HERVEY,

Attorney for Defendants in Error.

CHICAGO, 16th April, 1892.